

MAY 28 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

JAMES DARRELL SHORTT,

Petitioner - Appellant,

v.

ERNIE ROE, Warden; ATTORNEY
GENERAL OF THE STATE OF
CALIFORNIA,

Respondents - Appellees.

No. 01-57181

D.C. No. CV-99-03806-WJR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted October 10, 2002
Pasadena, California

Before: GOODWIN, RYMER, and McKEOWN, Circuit Judges.

The district court erred in construing Shortt's Rule 60(b) motion as a successive habeas petition under 28 U.S.C. § 2254 because Shortt's motion did not challenge the integrity of the state criminal trial but rather challenged the integrity

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of the federal habeas proceeding. See 28 U.S.C. § 2254(d)(1) (authorizing district courts to consider claims that were “adjudicated on the merits in State court proceedings [that] . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”).

The district court also erred in denying Shortt’s Rule 60(b) motion on the merits. This is not a case where a petitioner has failed to make or decided not to make a timely appeal and later attempts to circumvent procedural rules by filing a 60(b) motion. To the contrary, Shortt reasonably pursued avenues to obtain a hearing on the merits of his claims – which have been adjudged facially valid – and was frustrated in his attempts by the timing of subsequent authority. Under such circumstances, we conclude that Shortt has demonstrated “extraordinary circumstances” that warrant Rule 60(B)(6) relief. See Community Dental Services v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002).

Reversed and Remanded.